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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Tariffs Implementing	)	**CC Docket No. 97-250**
	)	
Access Charge Reform	)	
	)	

PETITION FOR RECONSIDERATION OF SBC COMMUNICATIONS, INC.

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JULY 1, 1998

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Summary*

The MO&O improperly implemented a new definition of non-primary lines and must be reversed. A definition of non-primary lines was not implemented by the Commission prior to the rate changes resulting from the Access Charge Reform Order. Pacific and the other LECs were told by Commission staff to use their own definitions until the Commission completed its rulemaking proceeding. Pursuant to these instructions, Pacific implemented a reasonable definition.

Notwithstanding the latitude given to the LECs to use their own definitions, the MO&O implemented a new requirement that all definitions must categorize additional lines billed to the same name at the same address (even though on different accounts) as non-primary lines. Based on this new requirement, the MO&O found Pacific's definition to be unreasonable.

The MO&O's new definition cannot be implemented in this proceeding. While SBC has asked the Commission to expediently act in the rulemaking proceeding, the Commission cannot implement the new definition here, especially on a retroactive basis. The requirements of due process, the Administrative Procedures Act, and the OMB paperwork reduction rules, all require the Commission to implement the new definition, if at all, only through the Defining Primary Lines NPRM established for that purpose.

***Abbreviations used in this Summary are referenced within the text.**

There are other reasons that the refund resulting from the new retroactive definition must also be reversed. The evidence upon which the refund was based was introduced into the record too late for Pacific to respond. The evidence, in the form of "studies" and statements by Pacific and industry analysts, covered "additional" lines, not any yet-to-be-defined "non-primary lines, and was therefore irrelevant.

SBC respectfully requests that the Commission reverse the MO&O as noted herein, and allow Pacific to revise its rates accordingly.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
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Tariffs Implementing	)	CC Docket No. 97-250
Access Charge Reform	)	

PETITION FOR RECONSIDERATION OF SBC COMMUNICATIONS INC.

SBC Communications Inc. (SBC), on behalf of Southwestern Bell Telephone Company (SWBT), Pacific Bell (Pacific), and Nevada Bell (Nevada), referred to jointly as "the SBC Companies" and pursuant to Section 1.106 of the rules of the Federal Communications Commission (Commission), hereby respectfully requests that the Commission reconsider and reverse the Memorandum Opinion and Order (MO&O) released June 1, 1998 as described below.

I. INTRODUCTION

The Access Charge Reform Order[1] amended the Commission's access charge rules and required "the most comprehensive changes to the Commission's system of interstate switched access charges since these tariffed charges first were introduced more than ten years ago."[2] The SBC Companies and other local exchange carriers (LECs) filed tariff revisions effective January 1, 1998 to implement these changes. On June 1, 1998, the Commission found certain of the price cap LECs' access reform tariffs to be unreasonable, and ordered refunds, notwithstanding the LECs' attempts to comply with these massive changes.

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[1] Access Charge Reform, 12 FCC Rcd 15982 (1997) (Access Charge Reform Order.)

[2] MO&O at para. 2

II. PACIFIC BELL SHOULD NOT BE REQUIRED TO REFUND ANY REVENUES DUE TO ITS NON-PRIMARY LINE COUNT.

The MO&O calculated the percentage of non-primary residential lines to total residential lines reported by the price cap LECs and compared these percentages with data collected by the Commission Staff, independent studies of additional residential line penetration levels and price cap LEC public statements. The MO&O used these data to prescribe an estimated count of non-primary lines for Pacific Bell. The MO&O determined that Pacific should have based its rates upon the MO&O's estimated "corrected" count, and ordered Pacific to make refunds to those customers that would have paid lower presubscribed interexchange carrier charge (PICC) rates.

The MO&O's determination of a refund should be reversed. The MO&O forces Pacific Bell to retroactively implement a heretofore unstated Commission definition of non-primary lines. The MO&O makes its finding based on evidence placed into the record at the 11th hour, and to which Pacific Bell had no opportunity to respond. Further, the evidence was irrelevant. Even if the definition could have been legally implemented retroactively, and even if the evidence would have been properly before the Commission to justify its result, a refund is not warranted in this matter, especially a refund of the size ordered by the MO&O.

A. The MO&O forces Pacific Bell to retroactively implement a heretofore unstated Commission definition of non-primary lines.

The MO&O improperly promulgates a new definition of non-primary lines. Just as the new definition cannot be imposed until, at a minimum, the Commission acts in a proper rulemaking proceeding, the new definition cannot be used to require a refund.

The MO&O admits that the Access Charge Reform Order did not provide a definition of primary and non-primary residential lines. The MO&O further concedes that the Commission initiated a rulemaking proceeding which sought comment on how to define primary and non-

primary residential lines,[3] and that this proceeding was not completed on time for the rates to be effective January 1, 1998, and is not completed even today.[4] Incumbent LECs were told to develop their own definitions of primary and non-primary residential lines for purposes of the access reform tariff filings, effective January 1, 1998.[5]

Notwithstanding this complete lack of guidance for the LECs, and the corresponding deference that was given to the LECs to implement their own definitions, the MO&O found unreasonable a definition properly implemented by Pacific. The MO&O also found unreasonable the definition used by the SBC Companies in cases where it does not identify as non-primary the additional residential lines billed under the same name at the same location. Thus, the MO&O, after the fact, now effectively imposes a definition of non-primary lines, determining that a second residential line is non-primary if the line is billed to the same name at the same location, regardless of the circumstances.

The Commission cannot give such a ruling retroactive effect; instead, the rule may operate only prospectively. See Georgetown Univ. Hosp. v. Bowen, 821 F.2d 750 (D.C. Cir. 1987), aff'd on other grounds, 488 U.S. 204 (1988); Health Ins. Ass'n v. Shalala, 23 F.3d 412,

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[3] On September 4, 1997 the FCC issued a Notice of Proposed Rulemaking, FCC 97-316, in which it sought comments on the development of the definition of a primary line. SBC as well as many others, provided comments, including a description of the definition that the SBC Companies would use. A copy of these Comments and Reply Comments are attached hereto. If a problem with this definition was evident, SBC should have been thus notified prior to its use, but was not, thus creating the impression that the definition was deemed reasonable.

[4] MO&O at para. 34. The Commission had previously assured LECs that a definition was to be issued in time: "In a further notice of proposed rulemaking in the Universal Service proceeding, we will address this issue, and release an order defining "primary" and "non-primary" residential lines by the end of the year." (Access Charge Reform Order at para. 83 (emphasis added).)

[5] The Common Carrier Bureau (Bureau) held a conference call on October 27, 1997, in which it orally directed the price cap LECs to implement their own definitions pending a Commission order defining primary lines. The Bureau did not confirm this order in writing, thus directly leading to the problems now cited.

422, 423 (D.C. Cir. 1994). A rule is retroactive if it "creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past." Association of Accredited Cosmetology Schools v. Alexander, 979 F.2d 859, 864 (D.C. Cir. 1992) (internal quotation marks omitted). An agency may not apply a new rule to choices that were made and conduct that occurred before the rules were changed. See RKO General, Inc. v. FCC, 670, F.2d 214, 224 (D.C. Cir. 1981) (where Commission changes course, it may "apply the changed standard only to those actions taken by parties after the new standard has been proclaimed as in effect" (emphasis added and internal quotation marks omitted)), cert. denied, 456 U.S. 927 (1982); Communications Satellite Corp. v. FCC, 611 F.2d 883, 908 (D.C. Cir. 1977) (Commission abused discretion by "imputing" a capital structure to corporation beginning in January 1975 when corporation was not put on notice of consequences of capital structure until December 1975); see also Landgraf v. USI Film Prods., 114 S. Ct. 1483, 1505-06 (1994) (holding that application of a newly enacted law to "conduct occurring before [the date of enactment]" constitutes retroactive application of the statute); Rivers v. Roadway Express, Inc., 114 S. Ct. 1510, 1520 (1994) (similar conclusion).

As stated in Section III below, the new definition promulgated by the MO&O must also fail since Office of Management and Budget (OMB) approval has not been obtained.

B. The MO&O makes its finding based on evidence to which Pacific Bell had no opportunity to respond, and which was not relevant in any event.

The Commission based its rejection of the Pacific Bell line count on two Commission Staff studies (the Additional Line Study and Excess Residential Loop Study), other "studies," and a public statement made by Pacific Bell. These materials were introduced into the record on

May 27, 1998.[6]

1. The materials were improperly placed into the record.

The introduction of these materials into the record on May 27, 1998, just three business days before the Commission released its MO&O, made it a practical impossibility to respond to them. This violation of due process mandates that the refund order be reversed.

Parties have a right to respond to materials such as those used by the Commission here. "The public interest in disclosure derives from the interest of parties to a proceeding in receiving adequate notice of potential bases for the agency decision, and an opportunity to comment on those grounds."[7]

Pacific was given no opportunity to comment on the studies introduced into the record three business days before the order was released. Pacific can find no ex parte notice of these materials. The Commission's ex parte rules are specifically drafted in order to give parties this right: "We do, however, find it appropriate to insist on strict enforcement of the existing notification requirement as to new data and argument both to ensure that parties receive fair notice of arguments made to the Commission and to ensure that a complete record is complied."[8]

Pacific had no opportunity to comment upon the May 27th materials, they cannot be used to penalize Pacific. The material must be stricken from the record and the MO&O must

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[6] See Letter from David L. Hunt, Staff Attorney, FCC to Magalie Roman Salas, Commission Secretary (dated May 27, 1998), and footnote 19 of the MO&O.

[7] Petition of Public Utilities Commission, State of Hawaii, 10 FCC Rcd 2359 (1995) citing Abbott Laboratories v. Young, 691 F. Supp. 462, 466-67 (D.D.C. 1988), remanded on other grounds, 920 F.2d 984 (D.C. Cir. 1990), cert. denied sub nom. Abbott Laboratories v. Kessler, 112 S. Ct. 76, 116 L.Ed.2d 49 (1991).

[8] Amendment of 47 C.F.R. § 1.1200 et. Seq. Concerning Ex Parte Presentations in Commission Proceedings, 12 FCC Rcd 7348 (1997), at para. 45.

therefore be reversed on this point since there is nothing else in the record to support a line count different from that submitted by Pacific.

2. The materials should have been rejected as irrelevant.

Even if these materials would have been properly placed before the Commission, they should have been dismissed as irrelevant. The MO&O bases its conclusion that Pacific's definition and resulting line count are unreasonable on a staff study, PNR and Associates survey results, and two other reports from Merrill Lynch and Salomon Brothers. The MO&O fails to acknowledge, however, that there are significant differences in the definitions of "additional lines" that have been used by the LECs in this proceeding and those apparently used in the cited studies. If the same definition had been consistently used, no refund would be necessary.

In particular, the 20% figure from the Pacific "public statement" cited by the MO&O is irrelevant for non-primary line purposes since this percentage was derived from plant type records. These records tell the installer or technician if service exists or has previously existed at the address. The indicator that is utilized represents existing facilities -- not necessarily that there is a working number there at the time. While accurate and useful from an operational and network planning perspective, this information does not provide an accurate count of "non-primary lines" for billing purposes. Pacific Bell's billing records reflect residential customers' billing choices, rather than a network planning approach to quantifying additional lines. Given the absence of a Commission definition of additional lines and the limited time frame for implementation mandated by the Commission, it should be clear that Pacific Bell's billing records were the only possible data source to utilize in the filing to be effective on January 1, 1998.

To count non-primary lines as the Commission's new definition requires, Pacific will need to internally investigate each account to determine if the individual records qualify for inclusion in the non-primary line count. Pacific Bell will then be required to repeat this same exercise when the Commission finally issues its next definition of non-primary lines in the rulemaking proceeding.

The MO&O claims that it is proper to include lifeline lines in the calculations of total residential lines. This approach, however, unfairly skews Pacific Bell's percentage lower. Pacific Bell has virtually half (over 48%) of the lifeline lines for all LECs displayed on Figure 1 of the MO&O. In addition, these lines represent 25% of the lines that Pacific has classified as primary. In Pacific Bell, as well as the other SBC Companies, one of the criteria for a customer to obtain and keep a lifeline line is that the customer may only have one line for the household. If the customer orders a second line, they lose the lifeline status on the first line. Therefore, none of the approximately 29 million lifeline lines in Pacific Bell could be classified as non-primary. Including the lifeline lines in the calculation of the percentage of additional lines distorts the number for Pacific. Removing the lifeline lines from the calculation increases Pacific's percentage of non-primary lines from 2.67% to 3.52%.[9]

When viewed from this perspective, Pacific's percentage must be found to be reasonable. The MO&O expressly found Citizens' reported percentage of 3.04 to be reasonable.

The Additional Line Study (ADL), based upon the PNR and Associates' data is clearly irrelevant here. The MO&O primarily relied upon this study in its analysis,[10] but it does not

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[9] While all the percentages of the other companies would also rise, none is impacted as distinctly as Pacific. The chart shows the industry average to be less than 6% (of lifeline lines to primary lines) as compared to over 32% for Pacific.

[10] MO&O at para. 19.

present a percentage of additional lines. Rather, it presents a percentage of households that have additional lines. Therefore, the 17.61% of households with additional lines cannot be compared to Pacific's 3.52% (corrected for lifeline) of additional lines. The ADL study totally ignores the fact that there can be multiple family units living in the same household. The ADL study merely asked the question, "Does your household have more than one telephone line (i.e. more than one telephone number)? 1 Yes and 2 No."[11] Therefore, the ADL study percentage is not valid to compare against Pacific's additional line percentage. It totally ignores the significant number of households that include more than one family unit. If the ADL study were based on additional lines for the same customer account, the percentage would be much closer to that for Pacific.

Any reliance placed upon the Merrill Lynch and Salomon Brothers "estimates" for purposes of this proceeding is also misplaced. The estimates cited by the MO&O are simply that, just estimates, not facts upon which the drastic remedy of a refund can only be based. The pages filed into the record provide no support for the estimates and thus they must be greatly discounted here.

3. Pacific's definition was reasonable.

The non-primary line count in Pacific Bell's filing was significantly lower than the MO&O's anticipated figure because of the SBC Companies' definition which was applied across all seven of the SBC Companies' states.[12] The SBC Companies consider a line to be non-primary if it is a line "billed on" the customer record, i.e., a multi-line residential account. If the

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[11] Id. at fn. 29.

[12] The result should not have surprised the Commission. SBC had stated in the Comments it filed on September 25, 1997, in CC Docket No. 97-181, at page 7, that: "For the seven States operations of the SBC LECs, approximately five (5%) of its total residential access lines are consolidated onto the same customer bill."

customer has multiple accounts (i.e., receives multiple bills) a primary line exists on each one. Therefore, a primary line exists on each customer's account and any other lines on that account are considered non-primary.

When a customer calls to request a new line in Pacific/Nevada Bell, there is no procedure directing the customer service representative to "bring up" any existing account record. The representative "sets-up" an entirely new record, separate from the original, which causes the billing system to generate separate bills for each line regardless of the name and address of the customer. In today's environment there could be a main line, a teen-age line or two, a computer line or two, a fax line, etc. The only time a customer receives a combined bill is if the customer requests "Consolidated Billing."

This process allows customers to control how their account is billed. The customer is not forced to have the lines billed together.

When billing system requirements were developed they followed the SBC definition. The MO&O determined that this process and definition generated a reasonable result for SWBT and Nevada, but not for Pacific. In Pacific's case the number was considerably lower than the 20% "additional line" statement cited by the MO&O. Nevertheless, the 2.67% result developed as a result of using a single definition is valid, because it has followed a definition that has produced acceptable results (according to the MO&O) in other states.

Further, the Commission's definition should not be imposed because it eliminates customer choice. Pacific's terms allow customers more options for managing their accounts. The MO&O did not consider the public interest in this regard.

Pacific justifiably believed that to the extent the definition did not precisely match the ultimate definition to be adopted by the Commission, the yet-to-be-adopted definition would

provide definitive direction. At that point, the LECs must be given appropriate time to implement any billing changes that would be needed.[13] Any self-initiated change to billing systems could otherwise be a waste of resources (if the SBC Companies were to guess wrong on what the Commission would ultimately adopt.)

C. The decision to require a refund misapplies the criteria outlined in the MO&O.

Under the MO&O's own guidelines for refunds, the refund is unwarranted. Specifically, the MO&O notes that refunds may not be appropriate, or an offset should be allowed, if the "same general group of customers were affected by both rates."[14] In this case, the IXCs that will be recipients of the refund will also be the same entities that were not charged the non-primary line rates in cases where (in the MO&O's view) such rates should have been charged.[15] Since there is an overlap between the parties advantaged and the parties disadvantaged, no refund should have been imposed. At a minimum, since the MO&O does not identify which lines were allegedly undercharged (and as it admits, no party can identify such lines) it would be reasonable to offset the refund based on the percentage of primary lines PIC'd to a carrier and the corresponding percentage of non-primary lines the MO&O believes that IXC should have had PIC'd to it.

The MO&O's decision to order a refund is also an abuse of discretion as Pacific gained no "windfall" from its practices. The MO&O leaves Pacific unable to recover all of the revenues

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[13] In the Reply Comments SBC filed on October 9, 1997, in CC Docket No. 97-181, SBC stated: "No matter what definition of "primary line" the Commission adopts or the method used to implement it, there is simply not enough time to take the actions that will be necessary to put the structure in place. Depending upon the resolution of the issues being debated in this proceeding, the SBC LECs have estimated that a minimum of six (6) months is needed after the decision in this proceeding is released." SBC Reply Comments at pp. 6-7.

[14] MO&O at para. 175.

[15] Id. at para. 179.

to which it would have been entitled had the Commission's definition been properly issued in time for Pacific to implement it. "Agencies should order restitution only when money was obtained in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it."[16] In this case, no good purpose is served by giving a "windfall" to the IXCs.

III. THE SBC COMPANIES CANNOT BE REQUIRED TO CHANGE THEIR APPLICATION OF THE DEFINITION OF NON-PRIMARY LINE.

As noted above in Section II, the MO&O admits that the Access Charge Reform Order did not provide a definition of primary and non-primary residential lines. For the reasons stated there, not only should the MO&O's new definition not be imposed to require a refund, it cannot be imposed at all in this proceeding. Only in the proper rulemaking docket could it be implemented. Thus, Pacific cannot be required to use it to revise its rates (or make a refund).

The new definition cannot be imposed for another reason: it improperly requires a new information collection requirement upon Pacific Bell. In the rulemaking process, the Commission is obliged to seek OMB approval of any new information collection requirement.[17] This new definition requires Pacific to gather information not previously required of it (the number of residential lines billed to the same name at the same location.)

Part 1320 of Title 5 of the OMB rules is clear on the requirements that the Commission must follow. Under the dictates of Section 1320.5, "[a]n agency shall not conduct or sponsor a

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[16] Koch Gateway Pipeline Company v. FERC, (Care No. 97-1024) (February 27, 1998, D.C. Cir.) quoting Towns of Concord, Norwood & Wellesley, Massachusetts v. FERC, 955 F.2d 67, 75 (D.C. Cir. 1992).

[17] The information collection rules apply to the definition. The Commission sought comment on the information collection requirement in the pending rulemaking proceeding. Defining Primary Lines, 12 FCC Rcd 13647 (1997) at para. 25. To date, counsel has not been able to determine that OMB approval (and a corresponding OMB control number) has been issued.

collection of information unless" it complies with the process for obtaining approval.

The failure to obtain approval offers strict consequences:

> (a) Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information that is subject to the requirements of this part if: (1) The collection of information does not display, in accordance with Sec. 1320.3(f) and Sec. 1320.5(b)(1), a currently valid OMB control number assigned by the Director in accordance with the Act; or (2) The agency fails to inform the potential person who is to respond to the collection of information, in accordance with Sec. 1320.5(b)(2), that such person is not required to respond to the collection of information unless it displays a currently valid OMB control number.
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> (b) The protection provided by paragraph (a) of this section may be raised in the form of a complete defense, bar, or otherwise to the imposition of such penalty at any time during the agency administrative process in which such penalty may be imposed or in any judicial action applicable thereto.[18]

Since the Commission has not apparently received OMB approval for this requirement, and since the definition cannot be implemented (either retrospectively or going forward) without such approval, the resultant change to Pacific's rates (and the refund) cannot be made.

IV. SWBT IS NOT REQUIRED TO MAKE ANY REFUNDS DUE TO ALLEGED HISTORICAL UNDERSTATEMENT OF THE BFP.

The MO&O requires SWBT to make adjustments to its maximum permitted carrier common line (CCL) rate to remove the effect that the alleged understatement of base factor portion (BFP) revenue requirements has on its CCL rate. SWBT is to make these recalculations using the AT&T CCL rate recalculation methodology, as modified by the MO&O. The MO&O alleges that while SWBT recalculated the maximum CCL rate and common line revenues by revising its CCL-1 charts, SWBT did not revise the CCL-1 chart it submitted for the 1997 annual tariff filing.

SWBT's filing, however, did in fact revise the CCL-1 chart it submitted for the 1997

[18] 5 C.F.R. Sections 1320.6 (a) and (b).

annual tariff filing. This revision showed that SWBT's maximum permitted CCL rates and common line revenues are no longer inflated due to the alleged historic understatement of BFP. Thus, no recalculation (and no refund) is warranted on this issue.

SWBT included the data requested by the Commission in section 15A of its Description and Justification (D&J) in its 1998 Annual Access Tariff Filing on June 16, 1998. The data is in the same format as the original CCL-1 chart.

V. CONCLUSION.

For the foregoing reasons, SBC respectfully requests that the Commission reconsider and reverse the MO&O in the manner described above.

Respectfully submitted.

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Certificate of Service

I, Mary Ann Morris, hereby certify that the foregoing, "Petition for Reconsideration of SBC Companies, Inc." in CC Docket No. 97-250 has been served on July 1, 1998, to the Parties of Record.

Mary Ann Morris

July 1, 1998

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D C. 20554

In the Matter of	)	
	)	CC Docket No. 97-181
Defining Primary Lines	)	

TO: The Commission

COMMENTS OF SOUTHWESTERN BELL TELEPHONE COMPANY, PACIFIC BELL, AND NEVADA BELL

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SUMMARY*

With these Comments and without waiving, prejudicing, or otherwise affecting any appeal, the SBC LECs provide input on the definition of "primary residence line" and the administration of the mandated two-tiered SLC structure.

This proceeding must remain focused on implementing that structure, which will thereafter be used by price cap LECs to charge their customers. This proceeding should not be used to develop a system that might eventually be considered for use to determine a "universal service primary line." Such a system is beyond the scope of this proceeding, and Section 254 considerations are irrelevant to how a price cap LEC apply their lawful rates.

The definition of "single-line business" should not be changed due, in part, to the unnecessary burdens on both incumbent LECs and business end-users.

The focus of this proceeding should be on implementing the two-tiered structure in a manner which is administrable, inexpensive and cost effective, customer-friendly and not confusing or irritating, and is capable to being audited. The implementation should not result in additional incentives or opportunities for "gaming the system." The SBC LECs thus propose the following definitions:

> Primary residence line - the initial line of a customer's account at a specific service address and for which a residential local exchange rate applies, determined with reference both to a price cap LEC residential local service offering and to any carrier reselling such offering.
>
> Non-primary residence lines - any lines to which a residential local exchange rate applies provided by a price cap LEC or a carrier reselling such service, and on a customer's account at the same service address as the primary residence line.

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* The abbreviations used in this Summary are as defined in the main text.